No. 82-1988

# In the Supreme Court of the United States

**OCTOBER TERM, 1983**

**BRUCE TOWER, Public Defender of Douglas County, Oregon, and**

**GARY BABCOCK, Public Defender of the State of Oregon,**

**Petitioners,**

**v.**

**BILLY IRL GLOVER,**

**Respondent.**

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF

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## REPLY BRIEF

## ARGUMENT

### I. Respondent Glover's arguments against absolute immunity of public defenders from § 1983 liability fundamentally are flawed by his failure to acknowledge that significant constitutional and public interests served by public defenders would be harmed by imposition of § 1983 liability.

Glover's opposition to public defender immunity in § 1983 actions reflects a myopic view of the public defender function. Glover recognizes that "[p]ublic defender programs were largely created after 1963, in response to . . . *Gideon v. Wainwright*, 372 U.S. 335 (1963) . . ." (Respondent's Brief at 9). He does not perceive, however, that public defenders provide constitutionally required defense services to the poor in particular ways that merit special protection.

Public defender programs enhance the abilities of states efficiently to provide effective assistance of counsel to large numbers of indigents because economies of time and money are inherent in the programs.[1] Moreover, the significance of an institu-

[1] *E.g.*, The New Hampshire Attorney General's Statistical Analysis Center found public defenders 30 percent less expensive per case than assigned counsel, LEFSTEIN, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, CRIMINAL DEFENSE FOR THE POOR, May 1982, Appendix A; Colorado court-

*(Continued on next page)*

tionalized public defender office, as contrasted with the ad hoc appointment of private counsel, is more than theoretical. Public defender programs offer individual clients special benefits not otherwise available. Under Oregon law, Or. Rev. Stat. §§ 151.030 and 151.220(5) (Petitioners' Brief at App. 3), the practice of defenders Tower and Babcock is limited to indigent criminal defense. Their clients, therefore, receive the services of attorneys who are experienced specialists in criminal law and and who are likely to be professionally and personally committed to indigent criminal defense. By contrast, private court-appointed counsel are often young and inexperienced. Approximately only one percent are criminal specialists and over 30 percent have no criminal jury trial experience whatsoever. BENNER & NEARY, THE OTHER FACE OF JUSTICE 44-45 (1973).

Public defenders, who practice in the institutionalized setting contemplated by laws such as those of the State of Oregon, are in the best position to identify and develop defense issues relating to particular classes of crimes and criminal procedures. Such defenders are exposed to masses of cases and,

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appointed counsel costs are 95.1 percent higher than the public defender's costs per case, *ibid.*

*See also* Criminal Defense Technical Assistance Project, Abt Associates Inc., San Diego County Office of Defender Services: Evaluation and Recommendations, December 1981, unpublished study, 41, "In virtually every community we have visited where a cost comparision has been conducted between a public defender program and a private bar program, the public defender program is less costly."

therefore possess a strategic perspective on prosecutorial practices, judicial procedures and personalities, and recent criminal caselaw developments. Public defenders can utilize this experience and expertise in defending complex and unpopular cases and in developing special procedures for application in broad ranges of cases. In addition, some public defender offices have staff investigators and social workers, who facilitate key elements of an effective criminal defense. BENNER & NEARY, THE OTHER FACE OF JUSTICE 21. Public defender implementation of special procedures can yield special benefits. Public defenders often see their clients more quickly after arrest and take less time between phases of the criminal justice process than private court-appointed counsel. Wice & Suwak, *Current Realities of Public Defender Programs: A National Survey & Analysis*, 10 Am. Crim. L. Bull. 161, 171 (1974); BENNER & NEARY, THE OTHER FACE OF JUSTICE 24, 46.

Public defender systems also play an important role in the continued funding of indigent defense services. Public defenders are an organized political presence in the legislative funding process. As a knowledgeable and identifiable office that produces effective delivery of required services, the public defender is in the best position to argue for increased funding for expanded services.

State and county public defender programs thus provide courts with an institutional resource of defense counsel that benefit indigent defendants and the criminal justice system in numerous and unique ways. Benner's survey conclusions are not surprising:

> "The full-time defender system was preferred by the greatest number of participants in the criminal justice system, including judges in jurisdictions presently utilizing assigned counsel systems." Benner, *Tokenism and the American Indigent: Some Perspectives on Defense Services*, 12 Am. Crim. L. Rev. 667, 671 (1975); *see* BENNER & NEARY, THE OTHER FACE OF JUSTICE Tables 92, 94, 101.

Moreover, the National Advisory Commission on Criminal Justice Standards and Goals, *Courts*, § 13.5 (1973), recommended that every jurisdiction provide indigent defense services through a "full-time public defender organization."

The capacity of public defender programs to provide effective assistance of counsel to indigents is consistently endangered, however, because of ever present high caseloads and limited financial resources. Glover recognizes neither this precarious balance nor the role played by public defenders in the comprehensive state system for providing constitutionally mandated defense services. Glover, therefore, does not appreciate how seriously the imposition of § 1983 liability on public defenders

would threaten to divert critically scarce, fixed resources away from indigent criminal defense. Instead, he asserts that the threat of resource-devouring suits is exaggerated (Respondent's Brief at 23-26). Respondent is wrong: The threat is substantial.

The Eisenberg study, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 535 n. 237, 555 (1982), documented that in one federal district studied, approximately six percent of the civil rights petitions filed by state prisoners in 1975 and in 1976 complained of problems with legal representation. (*See* Respondent's Brief at 24). If this percentage, advanced by respondent, reflects a national average, the *16,741* civil rights petitions filed by state prisoners in federal courts in 1982 (compared with 12,397 only two years before) would yield some *1,000 annual suits in federal courts*—or .5 percent of the total federal civil filings—which allege civil rights deprivations due to actions of defense counsel. *See* 1982 Annual Report of the Director of the Administrative Office of the United States Courts 92, 103. Petitioners have previously noted that many of these claims relating to the assistance of counsel can and would be recharacterized as conspiracy claims. (Petitioners' Brief at 28, 29 & n. 8). Plainly, the existence and future threat of suit is genuine.

Respondent also claims that the fact most suits do not reach trial indicates that mere reference to the number of suits "paint[s] a distorted picture." (Respondent's Brief at 24). However, the primary problem facing the public defender and the judicial system is not the number of cases which go to trial. Respondent overlooks the cost of pretrial motions, discovery, and all other financial and human resource diversions inherent in defense of a suit whether or not it goes to trial. (Petitioners' Brief at 30-32, 40-43). Further it must be expected that a significant number of prisoner suits will proceed to trial. Somewhere between three percent (Respondent's Brief at 24) and 5.8 percent (1975 Annual Report of the Director of the Administrative Office of the United States Courts, Table C-4) of prisoner civil rights suits reach trial. This range is roughly 50 percent of the 8.4 percent of all civil cases which reach trial. *Id.* at 210. The comparison demonstrates that conspiracy claims against public defenders do present a potential for resource drain similar to that caused by other civil suits.

The fact that somewhat fewer prisoner § 1983 suits go to trial probably reflects the predictably high rate of frivolous claims. *See, e.g., Minns v. Paul*, 542 F.2d 899, 902 (4th Cir. 1976); Eisenberg, *supra* p. 5, at 544. Judges, prosecutors and witnesses all possess immunity based, in part, on the common

sense recognition that they are magnets for vindictive and meritless suits. If public defenders are not granted immunity, they will be the last § 1983 target left for venting the frustration of the convicted. Public defender organizations face substantial exposure to suit simply because of their caseload volume and the fact they deal exclusively in indigent defense. Exposure of public defenders to § 1983 suits poses a real and substantial prospect of diversion of public defender resources.[2]

Glover fails, therefore, to acknowledge what must be deemed apparent: Imposition of § 1983 liability on public defenders would actually jeopardize states' abilities to provide effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments—an interest which § 1983 seeks to protect. Consequently, the states would be disinclined to experiment with innovative systems such as public defender programs, designed to improve the rendition of defense services to the poor.

These anomalies in the imposition § 1983 liability on public defenders would not have escaped the attention of the 1871 Congress. In this context, the

[2]Respondent and amicus mistakenly assert that we have argued that exposure to liability itself will hinder recruitment and retention of public defenders. (Respondent's Brief at 28; Amicus Brief at 17). Our point is simply that low salaries, caseload pressure, lack of support staff, and poor working conditions combine to hinder recruitment and retention. The cost of these § 1983 suits will exert more pressure on a strained system and exacerbate the problem. (Petitioners' Brief at 35).

policy of § 1983 to provide redress for deprivations of civil rights secured by the Fourteenth Amendment conflicts with the policy of the Fourteenth Amendment that states must provide adequate resources to guarantee indigent criminal defendants the effective assistance of counsel. Given this conflict, it is unlikely that the 1871 Congress would have intended to impose the costs of § 1983 liability on public defenders alleged to have acted under color of state law. A construction of § 1983 to require imposition of liability on public defenders would injure the state's systems for providing legal services to the poor. It could easily deprive the states and individual criminal defendants of the special benefits of an effective public defender system. Glover is simply wrong in asserting that the scope and purpose of § 1983 defy the creation of an immunity defense for public defenders. (Respondent's Brief at 6).

Moreover, contrary to Glover's assertion (Respondent's Brief at 7), petitioner's analysis of the legislative history of § 1983 and Congress' probable acceptance of immunity under the facts of this case cannot be dismissed as "stilted." *Briscoe v. Lahue*, ___ U.S. ___ , 103 S.Ct. 1108 (1983), directly recognized that the legislative history of § 1983 did not warrant the conclusion that the 1871 Congress, familiar with common-law immunity policies,

intended to abrogate those policies in § 1983 actions brought to remedy unjust criminal convictions. *See id.* 103 S.Ct. at 1113, 1118. *Briscoe* demonstrates that the broad wording of § 1983 cannot foreclose the recognition of immunity where its application comports with traditional immunity policies and is supported by a sufficient public interest that the immunity protects. *See Imbler v. Pachtman*, 424 U.S. 409, 421 (1976).[3] In short, immunity of public defenders is wholly compatible with the purposes of § 1983.

**II. Glover's contentions that absolute immunity cannot be afforded public defenders have no basis either in the common law or in recent decisions of this Court.**

Glover argues that the public defender is not a government official, and for that reason cannot be

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[3]This Court has consistently relied upon the historical and legal context of the enactment of 42 U.S.C. § 1983 in construing the statute. *See, e.g., Briscoe*, 103 S.Ct. at 1118; *Imbler*, 424 U.S. at 421; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). This approach permits an appropriate accommodation of the broad wording which reflects the emergency nature of the Act, and the limited, specific incentive for its passage—the racist lawlessness of the post-Civil War South.

> "Any application of section 1983 beyond the confines of racial problems must seek justification in something more than the intent of section 1983's framers. A case may be made for such extensions, but they are beyond the core concerns underlying section 1983's enactment." Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 485 (1982). *See also*, Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 Nw. L. Rev. 526, 541 (1977).

afforded any form of immunity. (Respondent's Brief at 10, 17-18). Glover's reasoning is fallacious.

A defendant need not exercise governmental power or hold an official title in order to assert immunity. *Briscoe v. Lahue*, *supra*, 103 S.Ct. at 1119, admonished "that immunity analysis rests on functional categories, not on the status of the defendant." Although the defendants in *Briscoe* were police officers, the Court commenced its examination of the immunity issue "by considering the potential liability of lay witnesses . . . ." 103 S.Ct. at 1112. Noting that private witnesses could act under color of state law by conspiring with state officials, the Court found it necessary "to go beyond the 'color of law' analysis to consider whether private witnesses may ever be held liable for damages under § 1983." 103 S.Ct. at 1113 n. 7. The Court examined the immunity of private witnesses, found that it obtained, and approached the question of police officer immunity by inquiring whether there existed a basis for creating an exception from the doctrine of lay witness immunity for police officers. *See id.* 103 S.Ct. at 1119-1120. *Briscoe* necessarily established that official status is not a condition to the assertion of immunity. 103 S.Ct. at 1116.

Glover maintains that the common-law privilege against defamation actions accorded attorneys was

limited solely to an advocate's conduct in examining witnesses and making argument in the courtroom. (Respondent's Brief at 12). This attempt to restrict the common-law immunity to attorney utterances that are made in open court lacks support.[4] Comments of counsel, even if made outside of judicial proceedings, remain privileged so long as they are made in connection with probable or existing litigation. *See Johnston v. Cartwright*, 355 F.2d 32, 37-38 (8th Cir. 1966). According to the Restatement:

> "An attorney at law is absolutely privileged to publish defamatory matter concerning another in communcations preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding." Restatement (Second) of Torts § 586 (1976).

The common-law immunities afforded § 1983 attorney defendants are broad enough to embrace conduct

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[4]The authority Glover cites for this proposition does not describe the attorney's common-law immunity from defamation actions as limited to the examination of witnesses and making of arguments. *See* Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463, 482-483 (1909).

Moreover, at the time § 1983 was enacted, the courts recognized that the defamation immunity of attorneys was based upon a broad public policy which parallels the public interest in encouraging a defender to make legal decisions free of the fetters of potential liability. The true purpose of the immunity was to enhance the public interest in an unrestricted flow of evidence and argument in order to aid the ascertainment of truth. *See Marsh v. Ellsworth*, 50 N.Y. 309, 312 (1872); *Shelfer v. Gooding*, 47 N.C. 175, 179-180 (1855).

Thus, the prosecutor and the defender at common law enjoyed the same absolute defense, and the defense was founded not merely upon the need to protect the private interests of litigants, but upon the vital public interest in the integrity of the judicial process itself.

which occurs even prior to litigation if that conduct bears a relation to the judicial proceedings.

Glover also argues that the limits of an attorney's common law immunity establish the limits of a public defender's § 1983 immunity (Respondent's Brief at 12-13). However, it follows from the facts and rationale of *Imbler v. Pachtman*, *supra*, that the damage immunity under 42 U.S.C. § 1983 need not be absolutely congruent with a pre-existing common-law immunity. In *Imbler*, Mr. Justice White concluded that at common law, a prosecutor had absolute damage immunity only from malicious prosecution actions (*i.e.*, for the decision to prosecute) and from defamation suits arising from remarks made during and pertinent to judicial proceedings. *Imbler v. Pachtman*, 424 U.S. at 441 (White, J., concurring in the judgment). Nevertheless, the Court held that a prosecutor's immunity from a § 1983 damage action extends beyond the reach of the particular common-law immunities available. The immunity protection extends not only to charges that the prosecutor intentionally had introduced false testimony in a trial, but also to allegations that the prosecutor suppressed evidence favorable to the accused. Indeed, *Imbler* concludes that damage immunity attaches to all prosecutorial conduct which is "intimately associated with the judicial phase of the criminal process," *id.*, 424 U.S. at 430. Glover's

attempt to limit a public defender's § 1983 immunity to contours of the defamation privilege should fail.[5]

Respondent Glover and amici on his behalf [National Association of Criminal Defense Lawyers and Oregon Criminal Defense Lawyers Association] persistently assert that public defenders are no different from any other defense counsel and therefore should be treated no differently (*e.g.*, Respondent's Brief at 8-9; Amicus Brief at 8). This assertion stems from a superficial application and basic

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[5]Contrary to respondent's contention, (Respondent's Brief at 16-17), *Imbler* also concludes that the presence of conspiratorial conduct, if undertaken in intimate association with the judicial process, would not bring that conduct outside the judicial process or cause that behavior to exceed the scope of a defender's protected discretionary functions. *Imbler*, 424 U.S. at 415-416, 430.

*Briscoe v. Lahue*, *supra*, demonstrates even more strongly that allegations of conspiracy should be insufficient to defeat the judicial character of a public defender's defense functions or to place them outside the scope of defense duties which should be privileged. The analysis of lay witness immunity in *Briscoe* proceeded on the assumption that a conspiracy between a witness and a state actor had been pleaded. 103 S.Ct. at 1113 n. 7. Nevertheless, in *Briscoe* this Court held that a witness who conspired to testify falsely acted within the scope of the witness' function and, therefore, was entitled to immunity. Glover's contention that conspiratorial conduct is necessarily outside the reach of immunity, is contrary to this Court's recent decisions as well as traditional precedents:

> "'The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. Gregoire v Biddle (CA2 NY) 177 F2d 579, 581." *Barr v. Matteo*, 360 U.S. 564, 572 (1959).

misapprehension of the statements of the Court in *Polk County v. Dodson*, 454 U.S. 312, 318-319 & n. 8 (1981); *Branti v. Finkel*, 445 U.S. 507, 519 (1980); and *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979). Those cases only make the point that a public defender's primary responsibility, like that of any defense counsel, is to serve the undivided interests of his or her individual client. Petitioners Tower and Babcock have never suggested otherwise. (Petitioners' Brief at 21).

Petitioners contend that the public defender performs a unique judgmental function in the judicial system basically comparable to that of the prosecutor which entitles the public defender to § 1983 immunity. (Petitioners' Brief at 21-24). This assertion is compatible with the recognition that a public defender owes primary responsibility to his individual client. In *Jones v. Barnes*, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed.2d 987 (1983) this Court held that criminal appellate counsel may exercise his own professional judgment and need *not* assert all colorable issues requested by the client. *Jones* recognizes that an attorney's responsibility to exercise his own professional judgment is not inconsistent with his duty to his client. Absolute immunity of public defenders from § 1983 liability is necessary to protect the defenders' exercise of such judgment. More than other defense attorneys, the

public defender will be called upon to decide which issues to press on behalf of his clients and whether issues are colorable or frivolous. As this case demonstrates, the public defender's exercise of such judgment readily can engender the filing of a federal civil rights suit by an unjustifiably disgruntled client. Recognition that a public defender's primary responsibility is to his client, thus, is in no way incompatible with public defender immunity under § 1983.

**III. Glover's assertion that public defender immunity would deprive indigent criminal defendants of equal protection of law is the product of erroneous constitutional analysis.**

Respondent argues that public defender immunity "will inevitably result in a denial of equal protection for certain indigent defendants in Oregon" because indigents represented by public defenders will be foreclosed from one avenue of relief for conspiratorial conduct by their defense counsel, whereas indigents represented by court-appointed counsel will not be similarly foreclosed. (Respondent's Brief at 19). Respondent's argument assumes too much and is analytically unsound.

Respondent assumes, first, that court-appointed counsel are not entitled to immunity under § 1983 in addition to public defenders. This Court has not declared that private, court-appointed lawyers are

subject to liability under § 1983 if they conspire with the judge or prosecutor.

Even assuming that public defenders were immune from liability whereas court-appointed counsel were not, recognition of public defender immunity from § 1983 liability accepts a line drawn not by the states but by the United States Congress. In such cases the Fifth Amendment Due Process Clause rather than the Fourteenth Amendment is relevant for purposes of addressing equal protection concerns. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The equal protection analysis apparently is the same under either constitutional provision. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). The appropriate inquiry in this case is whether the line which Congress has drawn between public defenders and other defense counsel "rationally furthers some legitimate, articulated [governmental] purpose. . . ." *San Antonio v. Rodriguez*, 411 U.S. 1, 17 (1973).[6]

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[6]Respondent does not contend that a strict scrutiny inquiry is required, and for good reason. Recognition of immunity for public defenders does not operate "to the disadvantage of some suspect class or impinge[s] upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17. The "right" which would be denied by a grant of public defender immunity is access to one particular remedy to redress a grievance. When Congress enacts a reform measure that provides relief to some but not all persons, the inquiry is whether Congress' decision to stop where it did was rational. *Cf. Katzenbach v. Morgan*, 384 U.S. 641, 656-657 (1966) (federal law exempting from English literacy tests for voting persons educated in American flag schools, where language of instruction was other than English, does not constitute forbidden discrimination against persons educated in schools beyond territorial

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The Congressional interest is strong: To enable states to provide the best and most efficient delivery of constitutionally required indigent defense services. As demonstrated in detail in this brief and in petitioners' opening brief, public defenders best further that interest and especially require an immunity. Recognizing an immunity from § 1983 liability for public defenders is a rational and effective means for Congress to insure the continued efficacious provision of constitutionally required defense.

Glover appears also to assert that individual states would deprive indigents represented by public defenders of equal protection by utilizing a public defender system in some regions and not in others. Glover assumes that a state's decision to establish or utilize public defenders in one area and not in another would be an arbitrary one. There are no facts in this record to support such a contention. If

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limits of the United States). This Court has aptly noted that "every reform that benefits some more than others may be criticized for what it fails to accomplish," but that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio v. Rodriguez*, *supra*, 411 U.S. at 39, 33.

Respondent attempts to argue that a fundamental right is implicated because public defender immunity would diminish attorney accountability and consequently affect the quality of representation and the Sixth Amendment right to counsel. (Respondent's Brief at 20). Diminished accountability requires actual diminution either in quality of representation or attorney responsibility. This Court has rejected the idea that an immunity without more produces lax standards. *Barr v. Matteo*, *supra*, 360 U.S. at 576. This Court has also noted that the potent remaining checks on lawyer misconduct undermine the argument that federal civil liability is required to insure attorney responsibility. *Imbler v. Pachtman*, *supra*, 424 U.S. at 429.

Congress had a rational basis for granting immunity to public defenders, such rationale should carry forward and insulate the states from a claim that the choice of different methods of providing indigent defense was without a rational basis. Moreover, it is apparent from petitioners' arguments in the opening brief and in this brief that public defender programs would be utilized to facilitate the state's provision of the most effective assistance of counsel to indigents. Recognition of public defender immunity from § 1983 liability serves the constitution and does not offend equal protection.

## CONCLUSION

States such as Oregon have experimented with various methods of providing constitutionally mandated legal services to indigent criminal defendants. States have determined that public defender programs are the most efficient and economical system for providing such services in an era of declining governmental resources and increased demand for state-paid legal services. Yet public defender systems face collapse under the weight of increased physical and financial costs if public defenders are not accorded immunity from § 1983 liability for actions performed in the course of representing their clients. Ironically, § 1983 liability of public defenders will discourage the states from continuing to seek better ways to provide defense

services and will compromise the state's abilities to provide counsel that is as effective as it is efficient. Sadly, the critical diversion of resources would be occasioned, in all likelihood, by spurious claims of ineffective assistance of counsel recast in vague conspiracy allegations by pro se clients, unjustifiably upset with their criminal convictions. However, thoughtful consideration of legislative history and policies underlying pertinent immunities compels recognition of a rule of absolute immunity from § 1983 liability for public defenders. The contrary decision of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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